

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2005B059**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FREDDIE L. MONTOYA,
Complainant,

vs.

COLORADO STATE UNIVERSITY AT PUEBLO,
Respondent.

THIS MATTER came on for hearing on February 24, 2005, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared through George C. Price, Esquire. Respondent appeared through Vincent Morscher, Assistant Attorney General.

MATTER APPEALED

Complainant, Freddie Montoya (“Montoya” or “Complainant”) appeals his administrative termination by Respondent, Colorado State University at Pueblo (“CSU” or “Respondent”). For the reasons set forth below, Respondent’s action is **affirmed**.

ISSUES

1. Whether Respondent’s action was arbitrary, capricious or contrary to rule or law;
2. Whether Respondent’s action constituted disability discrimination;
3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced employment at CSU in 1993. At all times relevant he was a Custodian I, and was a valued employee.
2. On July 29, 2003, Complainant was injured on the job in the course of lifting a commercial air conditioning switch unit. The unit slipped out of coworkers’ hands and fell onto him.
3. Complainant timely filed a Workers Compensation claim. That claim was settled in February 2005.

4. Complainant took significant time off from work. In January 2004, he returned to work with restrictions. In June 2004 he took additional time off due to stress related to his condition.
5. By September 30, 2004, Complainant had exhausted all available leave, including paid sick and annual leave, Family Medical Leave, and short term disability leave.
6. On October 1, 2004, Respondent permitted Complainant to take leave without pay. In early October, CSU Human Resources (HR) Director Kenneth Nufer and Vice President of Finance and Administration Joanne Ballard, Complainant's appointing authority, met with Complainant. They talked with him about his condition, and whether he felt he could be rehabilitated enough to return to work. He indicated he felt that he could.
7. In mid-October 2004, Complainant's physician released a report permitting him to return to work on modified duty. On October 26, 2004, Complainant returned to work on light, restricted duty.
8. On October 27, 2004, HR Director Nufer issued a memo to Complainant, copying Mr. Jo Duran, Complainant's immediate supervisor, concerning Complainant's modified work duties. The memo noted that Complainant's Workers Compensation physician's report indicated he should be placed on modified work duties for the period of October 26, 2004 through November 23, 2004. The memo listed the specific duties Complainant would perform and his work schedule. Complainant signed the memo, agreeing to "abide by the listed modified work duties."
9. In early November 2004, Duran directed Complainant to exceed his work restrictions. Complainant informed Nufer. Nufer, Complainant and Duran had a meeting during which Mr. Nufer informed Mr. Duran he would impose a corrective action against him if he attempted to have Complainant exceed his work restrictions.

Team Effort

10. "Team effort" is a term used by the custodians at CSU. It means that when one worker is unable to perform a specific job alone, the other custodians, and even other types of workers at times, help out. All custodians at CSU use team effort; they work well together.
11. CSU custodians had to perform several tasks with team effort on an annual basis. These included moving furniture out of the dorm rooms during the summer in order to clean the rooms (this oak furniture weighs over 200 pounds); moving tables in the university ballroom to set up for events; and other periodic tasks.

Essential Functions of Complainant's Position

12. The Class Series Description for Custodians describes the occupational work of the position as follows; "cleaning and maintaining building interiors and furnishings in state institutions and facilities. Following sanitary standards, positions wash, wipe, dust, scrub, scour, launder, disinfect, vacuum, sweep, mop, buff, and polish surfaces, floors, walls, windows,

lavatories, furnishings, and fabric and collect and dispose of trash. Assignments may include keeping exterior walkways clear of debris and snow.”

13. Two of the essential functions of Complainant’s position, sweeping and mopping, required at least four hours of his time per day.
14. Vacuuming was an essential function of Complainant’s position.
15. Occasional lifting of heavy objects is an essential function of Complainant’s position. The custodians must be able to lift heavy items such as full buckets, heavy furniture, and to shovel snow, independently.
16. Complainant demonstrated true dedication to his job in developing alternative means of performing several of his job duties. For example, he began to use brushes with extended handles to clean parts of the bathrooms, to avoid bending and squatting.
17. Complainant was a highly valued member of the custodial team at CSU. His peers value him as a co-worker and they do not want to see him lose his job. They are comfortable assisting Complainant in any way necessary to help him keep his job.
18. During the period November and December 2004, Respondent hired a temporary worker, Richard Maestas, to assist Complainant with the job duties he was unable to perform due to his injury. Maestas performed mopping, vacuuming, and other tasks. If Maestas was not present to assist Complainant, Complainant was unable to perform the essential functions of his position.

Maximum Medical Improvement (MMI)

19. In mid-November 2004, Complainant’s physician sent to Respondent his Impairment Rating, containing his determination that Complainant had reached “maximum medical improvement.” The relevant contents of that report are as follows:
 - A. “Mr. Montoya is placed at maximum medical improvement as of today’s date. He has had extensive detailed evaluation and treatment to this point. He is not likely to respond or benefit from any further intervention or treatment at the current time. He has had multiple second opinions and evaluations with a physiatrist, two spine surgeons, an occupational medicine specialist, two psychiatrists, an orthopedic surgeon and myself. He has also undergone some psychological counseling and biofeedback sessions initiated, which has not improved his condition significantly. He has had extensive medication treatment and had been off of work for the past four months and was previously off of work for three months last year.
 - B. “Permanent partial impairment is assigned according to the AMA Guides to Evaluation of Permanent Impairment Permanent restrictions are assigned based on the prior functional capacity exam and are discussed with the patient and will include that he may[:]

- lift up to 40 pounds occasionally,
 - carry up to 35 pounds occasionally,
 - push 71 pounds occasionally,
 - pull 110 pounds occasionally and
 - lift 20 pounds over head occasionally.
 - He may walk, stand or sit frequently or up to five hours each per day.
 - He may crawl, kneel, squat or climb occasionally or up to 2.5 hours each per day.
 - He may sit, stand, walk frequently and change position as needed.
 - He may occasionally sweep, mop, shovel or buff.
 - These restrictions may require some reevaluation in the future as time progresses, if the patient's symptoms significantly improve in his functional strength, then consideration for changing the restrictions may be necessary, but cannot be anticipated at this point and thus these are left as his permanent restrictions."
20. Complainant's permanent restrictions preclude him from performing the essential functions of his position, including the necessary sweeping and mopping, vacuuming, and occasional lifting of over 40 pounds.
21. Historic staffing patterns at CSU had included five regular custodians and four or more temporary employees, utilized primarily during the summer and other heavy-lifting periods.
22. In Fall 2004, fiscal cutbacks required that CSU operate with only two or three regular custodial staff, depending on the day of the week, and one temporary worker.
23. The current staffing at CSU does not permit the university to provide other custodians or temporary employees to permanently assist Complainant in the completion of the essential functions of his position.
24. Even with the team effort utilized by the entire custodial team, Complainant is unable to perform the essential functions of his position.

Nufer Meetings with Complainant and Ballard

25. Upon receipt of the MMI assessment from Complainant's physician, Nufer scheduled a meeting with Complainant to discuss his ability to perform the essential functions of the position on a long term basis. The two met on November 15, 2004. Nufer informed Complainant that it appeared he might have to lose his position, and that the results of the meeting would be reported to Ms. Ballard.
26. At the meeting, Complainant made it clear that he felt he could perform all of the functions of the job, despite the fact he spent a minimum of four hours per day sweeping and mopping. He discussed the team approach the custodians used for heavy lifting. He informed Nufer of the historic staffing patterns, and suggested raising the staffing level by at least one temporary worker, who could perform the sweeping and mopping portion of his job.

27. Prior to the meeting, Nufer had researched what, if any, other positions were vacant at CSU, to which Complainant might transfer. He identified administrative assistant positions, but nothing else. He shared this information with Complainant at the meeting. Unfortunately, Complainant did not possess the minimum qualifications for administrative assistant positions. Nufer and Complainant also discussed the prospect of Complainant returning to school and undergoing some retraining.
28. On the day of the meeting, Nufer sent a confirming memo to Complainant, reviewing the contents of their discussion.
29. Following the meeting, Nufer discussed the issue of moving furniture with Duran and one other custodian. They informed him of how the furniture was moved. Nufer knew that the custodial staff customarily used the team approach to moving furniture, but that circumstances sometimes dictated that a custodian move furniture by himself or herself.
30. After the November 15, 2004 meeting, Nufer did not discuss with the other custodial staff the possibility of their performing the sweeping and mopping functions of Complainant's position.
31. Nufer did not consider Complainant to be disabled as defined by the Americans with Disabilities Act. Complainant had never raised the issue with him. Nufer did not discuss the possibility of a reasonable accommodation for Complainant with Duran, Complainant's immediate supervisor.
32. Nufer did not contact Complainant's doctor to discuss future prospects for improvement, because his professional experience with Workers Compensation claims was such that he viewed the MMI determination, and attendant permanent work restrictions, as final. Complainant had informed him at the November 15 meeting that he had another meeting scheduled with his doctor to assess whether he had undergone any further improvement.
33. On November 16, 2004, Nufer sent a memo to appointing authority Ballard, attaching his November 15 confirming memo to Complainant and the Position Description Questionnaire for Complainant's position. Nufer informed Ballard of Complainant's work history, his MMI status and his permanent restrictions, and the results of the meeting with Complainant on November 15, 2004. He concluded by presenting Ms. Ballard with two options: either hiring additional personnel to complete the sweeping and mopping requirements of Complainant's job, and restructure his position accordingly (by reducing it to half time or by substituting different duties), or by administratively discharging him on the basis he could no longer perform the essential functions of his position.
34. On November 22, 2004, Ballard and Nufer met to discuss the question of whether to administratively terminate Complainant or to hire additional temporary custodial staff.
35. Ballard had read the physician's Impairment Rating report, which contained a detailed history of Complainant's physical condition, a description of his maximum medical

improvement, and the list of his permanent work restrictions, in mid-November. She and Nufer discussed that report. They discussed their options.

36. Ballard concluded on the basis of the doctor's report and the information contained in Nufer's November 16 memo that Complainant could no longer perform the duties of the Custodian I position at CSU. She was unaware of whether any Americans with Disabilities Act (ADA) regulations might apply to Complainant's case, as he had not raised that as an issue with her or with Nufer. Nufer did not raise the issue with her either.
37. She determined that it would cost approximately \$22,000 to hire additional staff to pick up the work Complainant was unable to perform. She concluded that it would not be reasonable, and in fact would set a bad precedent, to hire a second employee at significant cost, because one employee could not fully perform the duties of his position.
38. Ballard felt she had no choice but to administratively discharge Complainant, due to fiscal limitations.

DISCUSSION

I. BURDEN OF PROOF

In this de novo proceeding, Complainant bears the burden to prove by preponderant evidence that Respondent's administrative termination of his employment was arbitrary, capricious, or contrary to rule or law. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); Section 24-50-103(6), C.R.S. Complainant also bears the burden of proof in his disability discrimination claim. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288 (Colo. 2000).

II. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF DISABILITY

Complainant argues that he was terminated on the basis of disability in violation of the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S. ("the Act").

Under the Act,

"It shall be a discriminatory or unfair employment practice: (a) For an employer . . . to discharge . . . any person otherwise qualified because of disability . . . but, with regard to a disability, it is not a discriminatory practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1), C.R.S.

Complainant does not have a disability under the Act.

Disability under the Act “means a physical impairment which substantially limits one or more of a person’s major life activities and includes a record of such an impairment and being regarded as having such an impairment.” Section 24-34-301(2.5)(a), C.R.S. The Colorado Civil Rights Commission (“the Commission”) has promulgated rules in which it interprets the Act as being “substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act,” 42 U.S.C. Sections 12101 - 12117 (1994). Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of the state Act “shall follow the interpretations established in Federal regulations adopted to implement the [ADA] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.” *Id.*

Under state and federal rules, “A major life activity is a basic activity that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, ‘functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.’” *Id.* In determining whether an individual is substantially limited in a major life activity, “three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. Section 1630.2(j)(2)

Complainant’s limitations do not substantially limit a major life activity; Complainant has provided no legal authority supporting such a conclusion. While his impairment limits his ability to lift, carry, push, and pull, Complainant has not demonstrate that these limitations substantially limit him in a major life activity. The remainder of Complainant’s limitations concern the length of time in which he can perform specific tasks. However, these limitations, taken as a whole, again do not limit him in any major life activity. Complainant’s inability to perform the specific job of Custodian I does not render him disabled under the Act. *Weiler v. Household Finance Corp.*, 101 F.3d 519, 525 (7th Cir. 1996)(inability to perform one job does not substantially limit one in the major life activity of working). The evidence further established that Respondent did not consider Complainant to be disabled. Therefore, Complainant has failed to meet his burden of showing he was disabled under the Act.

Complainant is not a Qualified Person under the Act.

Assuming arguendo that Complainant is disabled as defined by the Act, he has failed to prove that he is a “qualified person with a disability,” i.e., that he can perform the essential functions of his position with or without reasonable accommodation. *Frazier v. Simmons*, 254 F.3d 1247, 121256 (10th Cir. 2001). Essential functions are defined as the fundamental job duties of the employment position the individual with a disability holds or desires. *Martin v. Kansas*, 190 F.3d 1120, 1130 (10th Cir. 1999). The preponderance of evidence demonstrated that sweeping, mopping, vacuuming, and occasional lifting of over 40 pounds were essential functions of the position Complainant held and desires. The question, therefore, is whether Respondent could have reasonably accommodated Complainant’s inability to perform these tasks.

Employers are required to make reasonable accommodation to the known physical limitations of an otherwise qualified disabled employee unless the employer can demonstrate the

accommodation would impose an undue hardship or that it would require any additional expense that would not otherwise be incurred. CCRD Rule 60.2(C)(1).

Reasonable accommodation includes making existing facilities readily accessible; job restructuring, part-time or modified work schedules; and acquisition or modification of equipment or devices. CCRD Rule 60.2(C)(2)(b). Respondent considered job restructuring and part-time for Complainant and rejected it. This conclusion was based on the significant cost, up to \$22,000. Such an accommodation herein would have created an undue hardship on the employer. Therefore, Complainant has failed to prove that Respondent violated the Act by failing to provide a reasonable accommodation.

III. RESPONDENT'S ACTION WAS NOT ARBITRARY OR CAPRICIOUS

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

The preponderance of evidence demonstrated that Respondent was diligent in its pursuit of accurate, complete information on Complainant's physical limitations, that it gave appropriate consideration to all information before it, and that it acted reasonably in this situation. Complainant has failed to demonstrate that Respondent's decision was arbitrary and capricious.

Director's Procedure P-5-10 states, "If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. . . . No employee may be administratively discharged if FML and/or short-term disability leave . . . apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship."

Respondent provided Complainant with unpaid leave in order to give him extra time to prepare for his return to work; once he returned, Respondent hired a temporary employee for two months to assist him in performing the essential functions of his position. The law required Respondent to do neither of these things. The evidence demonstrated that Nufer and Ballard sought to assist Complainant in returning to his position, but in the end had no choice but to administratively terminate him.

Complainant requested an award of attorney fees and costs. Because he did not prevail on his claim, there is no basis for such an award. Section 24-50-125.5, C.R.S.

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant on the basis of disability;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is **dismissed with prejudice**.

DATED this ____ day
of **April 2005** at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the____ day of **April 2005**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

George C. Price
900 Logan Street
Denver, Colorado 80203

And interagency mail to:

Vincent E. Morscher
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